

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1378

Original

To be argued by
GERARD M. DAMIANI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1378

UNITED STATES OF AMERICA,

Appellee,

— v. —

JOHN J. O'CONNOR

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT JOHN J. O'CONNOR'S BRIEF

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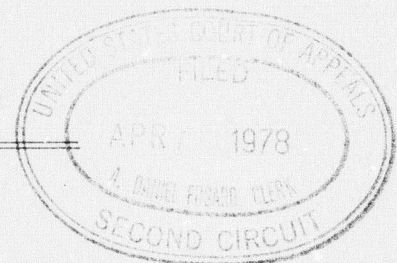


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES	iii.
TABLE OF STATUTES.	v.
MISCELLANEOUS CITATIONS.	v.
PRELIMINARY STATEMENT.	1
INTRODUCTION	3
STATEMENT OF FACTS	5
SYNOPSIS.	5
THE GOVERNMENT'S DIRECT CASE	7
TESTIMONY AS TO SIMILAR ACTS	12
THE DEFENDANT'S CASE.	15
GOVERNMENT'S REBUTTAL TESTIMONY	21
ARGUMENT	24
POINT I	
UNDER THE FACTS OF THIS CASE, THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE GOVERNMENT, BOTH IN ITS DIRECT AND REBUTTAL CASES, TO INTRODUCE PRIOR SIMILAR ACT TESTIMONY	24
POINT II	
THE COURT'S FAILURE TO GRANT DEFEN- DANT'S MOTION FOR A MISTRIAL FOLLOW ING THE TESTIMONY ELICITED FROM THE WITNESS GENTLECORE AFTER THE JURY HAD HEARD EVIDENCE OF "SIMILAR ACT" CON- DUCT WAS ERROR REQUIRING REVERSAL OF DEFENDANT'S CONVICTION	39

TABLE OF CONTENTS, CONT'D.

ii.

Page

POINT III

DEFENDANT WAS DENIED A SIXTH AMENDMENT
RIGHT TO CONFRONTATION BY THE TRIAL
COURT'S ERRONEOUS RULINGS WHICH LIMIT-
ED BOTH DIRECT AND CROSS-EXAMINATIONS
BY DEFENDANT'S COUNSEL. 45

POINT IV

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR DENYING DEFENDANT A FAIR TRIAL
IN CHARGING, PURSUANT TO THE GOVERN-
MENT'S REQUEST AND OVER DEFENDANT'S
OBJECTION, THE CONGRESSIONAL INTENT IN
PASSING THE MEAT INSPECTION ACT, AND IN
GIVING ALLEN CHARGES 48

TABLE OF CASES

	<u>Page</u>
<u>Alderman v. United States</u> , 394 U.S. 165 (1969)	47
<u>Alford v. United States</u> , 282 U.S. 267.	47
<u>Brookhart v. Janis</u> , 384 U.S. 1 (1966).	46, 47
<u>Dennis v. United States</u> , 384 U.S. 855 (1966)	47
<u>Douglas v. Alabama</u> , 380 U.S. 415 (1965).	47
<u>Heard v. United States</u> , 255 F. 829 (8th Cir. 1919),	47
<u>Holt v. United States</u> , 94 F. 2d 90 (10th Cir. 1937)	45
<u>Kotteakos v. United States</u> , 328 U.S. 750 (1946).	44
<u>Marshall v. United States</u> , 360 U.S. 310 (1959)	45
<u>Pointer v. Texas</u> , 380 U.S. 400 (1965)	47
<u>Smith v. Illinois</u> , 390 U.S. 129.	47
<u>United States v. Adderly</u> , 529 F. 2d 1178 (5th Cir. 1976).	26, 27
<u>United States v. Benedetto</u> , No. 77-1306 (2d Cir. Feb. 24, 1978)	4, 10, 26, 35, 37, 38
<u>United States v. Bowe</u> , 360 F. 2d 1 (2d Cir. 1964), cert. denied, 385 U.S. 96 (1966)	36
<u>United States v. Byrd</u> , 352 F. 2d 570 (2d Cir. 1965).	26, 29, 30, 31
<u>United States v. Carney</u> , 461 F. 2d 465 (3rd Cir. 1972)	45
<u>United States v. D'Anna</u> , 450 F. 2d 1201 (2d Cir. 1971).	49
<u>United States v. Deaton</u> , 381 F. 2d 114 (2d Cir. 1967).	26, 28
<u>United States v. DeCicco</u> , 435 F. 2d 478 (2d Cir. 1970).	5, 29, 30

TABLE OF CASES, CONT'D.

	<u>Page</u>
<u>United States v. DeDominicis</u> , 332 F. 2d 207 (2d Cir. 1964)	45
<u>United States v. Goodwin</u> , 492 F. 2d 1141 (5th Cir.1974)	35
<u>United States v. Gray</u> , 468 F. 2d. 257 (3rd Cir.1972)	45
<u>United States v. Gubelman</u> , No.77-1279 (2d Cir.Feb.24, 1978)	4, 10,20, 27, 37
<u>United States v. Jackson</u> , 418 F. 2d 786 (6th Cir. 1969)	45
<u>United States v. Jacongelo</u> , 281 F. 2d 574 (3rd Cir. 1960)	45
<u>United States v. Kaufman</u> , 453 F. 2d 306 (2d Cir,1971)	26
<u>United States v. Leon</u> , 534 F. 2d 667 (6th Cir. 1976)	48, 49
<u>United States v. Light</u> , 394 F. 2d. 326 (2d Cir.1964), <u>cert.denied</u> 380 U.S.945.	34, 35
<u>United States v. Marchiso</u> , 344 F. 2d 653 (2d Cir. 1965)	26
<u>United States v. Ross</u> , 321 F. 2d 61 (2d Cir. 1963)	31
<u>United States v. Santiago</u> , 528 F. 2d 1130 (2d Cir.1976), <u>cert.denied</u> , 425 U.S. 972 (1976).	26
<u>United States v. Stadter</u> , 336 F. 2d 326 (2d Cir. 1964), <u>cert.denied</u> 380 U.S. 945.	33, 34

TABLE OF STATUTES

	<u>Page</u>
Rule 403, Federal Rules of Evidence.	3, 25, 27, 36
Rule 404 (b), Federal Rules of Evidence.	3, 4, 25
Rule 607, Federal Rules of Evidence.	37
Title 18, United States Code, §§ 201, 209.	8
Title 21, United States Code, § 622.	6

MISCELLANEOUS CITATIONS

	<u>Page</u>
2 J. Weinstein & M. Berger, <u>Weinstein's Evidence</u> (1976).	25, 26, 33

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

DOCKET NO. 77-1378

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
- against -
JOHN J. O'CONNOR,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT IN THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

BRIEF OF DEFENDANT-APPELLANT JOHN J. O'CONNOR
(Who will be referred to herein as "Defendant")

PRELIMINARY STATEMENT

Defendant, John J. O'Connor, appeals from a judgment of the United States District Court for the Southern District of New York rendered on the 26th day of May, 1977, after an eight-day jury trial before Honorable Irving Ben Cooper.

Indictment 76-Cr. 1030 filed on November 9, 1976, charged that while defendant was a Federal meat inspector assigned to the West Harlem Pork Center Ltd., Kupferberg Brothers and F. Strassburger, Inc., he accepted from each of said concerns money and other things of value. The times and approximate weekly amounts allegedly accepted were set forth in each count of the three-count Indictment, said action being in violation of Title 21 U.S.C., §622.

The trial began on May 17, 1977, and concluded on May 26, 1977, when the jury, after two days of deliberation, found defendant guilty on Counts One and Two of the Indictment and not guilty on Count Three of the Indictment.

On July 21, 1977, over the continued claim of innocence by the defendant*(T. 925 and 928), the Trial Justice sentenced the defendant to a split sentence of two years to be served by six months incarceration and eighteen months probation. The Court stayed sentencing pending Appeal and the defendant has remained free on his own recognizance pending Appeal.

Defendant's trial counsel filed a Notice of Appeal with the Clerk of the United States District Court, Southern District of New York on July 27, 1977 and was thereafter appointed to represent defendant on this Appeal, pursuant to the Criminal Justice Act by Order of this Court dated September 15, 1977.

* References to the Trial Transcript will be designated "T."
References to the defendant's exhibits will be designated "D.X."
References to Government's exhibits will be designated "G.X."
References to Joint Appendix will be designated "A" followed by page number.

The original scheduling Order issued by the Court provided that a copy of the Transcript of Testimony be filed with the Clerk of the District Court on or before September 29, 1977, and that the defendant's Brief and Appendix be filed on or before October 31, 1977. The original scheduling Order was thereafter vacated ex parte, since the court reporter's office advised that although the Trial Transcript would be complete by October 6, 1977, it could not be released to defendant's counsel until reviewed by the Trial Justice.

Thereafter and in the months that followed, defendant's counsel made inquiries of the court reporter's office and the office of the Clerk of the Court of Appeals with regard to the Trial Transcript and was advised on each occasion that the Trial Justice had not yet approved the release of the Transcript. The Transcript, upon information and belief, was finally released and filed on March 3, 1978, whereupon a new scheduling Order was also issued directing the defendant's Brief and Appendix to be filed on or before April 5, 1978.

INTRODUCTION

This Appeal, in the writer's opinion, creates, among other issues, a most serious question concerning the admissibility of "similar act" testimony in this Circuit and whether this Circuit has, in fact, determined that a Trial Justice has merely to apply lip service to Rules 404 (b) and 403 of the Federal Rules of Evidence and whether this Circuit thus considers "similar act" testimony as a practical matter, automatically admissible, as appears to be the Court's determination in the instant case.

Is there any real meaning to said Rules and, if so, is it not incumbent upon the Trial Justice to require the Government to demonstrate the relevancy of such "similar act" testimony to be offered as to an issue cited in Rule 404 (b) and raised in the trial prior to its proposed offer, when said offer of "similar act" testimony is made by the Government and decided by the Court at the conclusion of the Government's case but prior to the presentation of any evidence by the defendant?

It is in the defendant trial counsel's approach to the Government's direct case that defendant respectfully contends that the facts of defendant's case are clearly distinguishable from the facts and recent decisions of this Court in the matters of United States v. Benedetto and United States v. Gubelman, decided on February 24, 1978, under Docket Nos. 77-1306 and 77-1279 respectively, as those Decisions apply to the admissibility of "similar act" testimony.

Additionally, and with equally great importance and distinction, following the admissibility of the "similar act" testimony, was the natural and logical prejudicial effect engendered by the Government's improper elicitation of additional testimony concerning three payments allegedly made to defendant by employees of three meatpacking houses in Brooklyn, whereupon and following said testimony, defendant's counsel immediately moved for a mistrial, which Motion, after argument, was denied by the Trial Court.

Defendant respectfully submits that the facts surrounding the admissibility of "similar act" testimony in defendant's case are clearly distinguishable from the Benedetto and Gubelman cases.

and squarely within the guidelines of U. S. v. DeCicco, 435 F. 2d 478 (2nd Cir. 1970), requiring exclusion by the Trial Justice.

Additionally, under the facts of defendant's case, the only appropriate remedy to combat the potential prejudice that naturally and logically flowed from the Government's improper elicitation of additional testimony concerning alleged payments made to defendant was to declare a mistrial as requested by defendant's counsel.

As a result of those issues as well as other issues set forth in additional points of defendant's Brief, defendant seeks a complete review of the proceedings below and respectfully submits that a reversal of the Judgment of Conviction on Counts One and Two is warranted.

STATEMENT OF FACTS

Defendant, married and father of six children ranging in age from 16 years old to 3 years old, received his appointment as an inspector with the United States Department of Agriculture, Animal and Poultry Division, on March 8, 1970.

Prior to this appointment defendant had been an employee of F. Strassberger, Inc.* for approximately four years. Prior thereto he had held various positions of steady employment including employment as a police officer with the Suffolk County Police Department (T.557-59)

*Count Three of the instant Indictment contains allegations concerning defendant's receipt of monies from his former employer, F. Strassberger, Inc. The Jury returned a verdict of not guilty with respect to said Count.

While employed as a Federal meat inspector, defendant's primary responsibility was to enforce standards regarding sanitation and proper identification of meat products so that meat leaving a plant was wholesome and fit for human consumption.

Defendant served as a Federal meat inspector from March 8, 1970, until his suspension on January 10, 1977 (G.X. 15). At present and since on or about October 1, 1975 and at the time of the filing of the instant Indictment, defendant resided with his family in New Castle, Pennsylvania, having received a requested transfer to that area from the United States Department of Agriculture.

On or about November 9, 1976, a three-count Indictment was filed in the Southern District of New York under Indictment No. 76 Cr. 1030. Said Indictment contained three counts of alleged violations of Title 21, United States Code, §622 (A3).

Title 21, United States Code, §622, "Bribery of or Gifts to inspectors or other officers and acceptances of gifts", provides:

" . . . any inspector, deputy inspector, chief inspector, or other officer or employee of the United States authorized to perform any of the duties prescribed by this subchapter who shall accept any money, gift or other thing of value from any person, firm or corporation, or officers, agents or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm or corporation engaged in commerce any gift, money or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a felony and shall, upon conviction thereof, be summarily discharged from office and shall be punished by a fine not less than \$1,000 nor more than \$10,000 and by imprisonment not less than one year nor more than three years."

Defendant pleaded not guilty to this Indictment and trial commenced before Judge Cooper and a jury on May 17, 1977.

THE GOVERNMENT'S DIRECT CASE

The Government's direct case against defendant consisted of the testimony of four witnesses: George Puchta, Acting Area Supervisor for the United States Department of Agriculture Meat and Poultry Inspection Program; Maurice G. Jacobson, representing West Harlem Pork Center, Ltd.; Bernard Jacobson, representing F. Strassberger, Inc.; and Morris Kupferberg, representing Kupferberg Brothers, Inc.

George Puchta testified on direct examination generally as to the Meat and Poultry Inspection Program under the Federal Meat Inspection Act of 1967. This witness identified a number of Government documents entitled "Time and Attendance Records", which documents were prepared by defendant and filed with the Department of Agriculture relating to defendant's various assignments applicable to the time periods charged in the Indictment (G.X. 1, 2, 3, and 10).

Although it is conceded that one in the position of a meat inspector, as was defendant, had a great deal of discretion with respect to carrying out his duties, Mr. Puchta established on cross-examination that the discretion was subject to review by area supervisors and circuit supervisors, all within the same geographical area wherein the inspector's determination would be made.

The witness also testified that he had known defendant from on or about 1969 and was defendant's immediate supervisor

with an obligation to oversee defendant's performance during said time and that his performance had been acceptable. It was also during the course of the testimony of Puchta that the Government conceded that defendant was not physically present at any of these establishments referred to in the Indictment between September 9th and September 28, 1974, which periods were included in the time periods referred to in each of the Counts of the Indictment wherein the Government alleged defendant received weekly payments.

The witness further acknowledged that in his official capacity he had knowledge that the Federal Bureau of Investigation had assigned various FBI agents and an informant to this investigation and that, in addition, the Office of Investigation of the Department of Agriculture was also assigned to the same.

The next three witnesses against defendant were Maurice Jacobson, Manager and Operator of West Harlem Pork Center, Ltd., Bernard Jacobson, Vice-President of F. Strassberger, Inc., and Morris Kupferberg, an owner and operator of Kupferberg Brothers, the companies specified in the three Counts of the Indictment.

The direct testimony of each of the above-referenced witnesses was similar in nature and in substance. Each testified that they had received letters of personal immunity from the Government providing for guilty pleas to be entered by the corporations, which pleas would be in full satisfaction of any violation of Title 18 of the United States Code, §201 and 209, which could be brought in either the Eastern or Southern District of New York. Additionally, said immunity agreement provided that the United States Attorney's Office would recommend to the

Internal Revenue Service that no criminal charges be instituted against the witnesses as a result of the alleged payments made to the Department of Agriculture employees (See G.X. 17, 18 and 19).

The witnesses all testified that they knew the defendant, John O'Connor; that the defendant was an inspector in their plant during the times charged in the Indictment; that they paid the defendant money each week; that payments were made in cash throughout various places on the premises and that the payments were not witnessed by any parties. None of the witnesses, however, testified to any specific instance when defendant ever requested or demanded any such payment. It was clear, however, from the testimony that the reason the alleged payment to the defendant and other inspectors was made was so that production would not be impeded. Contrary to the claim of the witness, Bernard Jacobson, that as a result of payments to the defendant, the witness never had any work stoppage, the defendant established through defendant's Exhibit "B" in evidence that on at least two occasions, defendant had shut the witness' plant down for various periods of time (T. 199-201-03).

The sole issue raised by the defendant's counsel in the cross-examination of the Government's main witnesses was that of credibility as affected by their prejudices, their motives and their interest in the testimony presented by them against defendant. Defendant's claim was simply that he did not receive the monies or goods as charged in the Indictment. (T. 144 - Cross-examination of witness Maurice Jacobson):

" . . . Do you know of any way that we can establish that you are not telling the truth

or John O'Connor is not telling the truth in this proceeding?

MR. LAWLER: Objection, your Honor.

THE COURT: No; I think it's a good question. Let's see what we come up with.

What is your answer?

A. Do I know of any way -- it was him and I, that's all. I mean, it's his word against mine. What can I tell you? You take it from there. I'm telling you the truth.

Q. If Mr. O'Connor - -

MR. DAMIANI: I would respectfully ask that that be stricken.

THE COURT: Yes.

Q. So therefore, when Mr. O'Connor says he didn't take any money from you, again, we have no way of establishing that, either. We can't prove the negative. Isn't that the fact?

A. Yes, sir."

Unlike the cases of United States v. Benedetto, supra, and United States v. Gubelman, supra, defendant's counsel, on cross-examination of the Government's main witnesses, intentionally, and specifically did not attempt to impeach, either directly or indirectly, any of their testimony with regard to the issue of identification. On the contrary, it was established without question that in the case of the witness Bernard Jacobson, that there was a previous employer-employee relationship which extended for a period of approximately four years prior to the time that the defendant became a Federal meat inspector. Defendant's counsel at no time raised any issue of mistaken identity and intentionally and specifically left the subject alone, even when an opportunity

to challenge the same arose in the Government's redirect examination of the witness Kupferberg (T.258-62).

During a court recess immediately prior to the completion of the cross-examination of the Government's last main witness Kupferberg, the Court determined it would hear argument with regard to the request by the Government to present evidence of "prior similar act" testimony in its direct case (A27 through A43). The Government offered a Memorandum in support of its position (A6) and the defendant submitted a Memorandum seeking the exclusion of said "similar act" testimony (A12). The Government alleged that it would hope to show proof of "similar acts" and therefore to introduce testimony from witnesses from three companies, individuals who would state that they paid defendant money or products while he was an inspector in their plants. The Government alleged that the dates in question varied and that, for the most part, they concerned themselves with the years 1973 and 1974, although on one occasion the time period was from 1972 to 1974. After reflection, the Government decided it would only use two of the alleged "similar acts" in its direct case and hold the third for rebuttal in the event that the defendant took the stand (A28-29). Defendant's counsel vehemently objected to the presentation of any "similar act" testimony, arguing that the Government had not shown any evidence as to the need for or the admissibility of the "similar act" testimony; that such testimony was equivocal in nature, cumulative, remote in time and would be unduly prejudicial to the defendant (A30-38). Following argument of counsel, the Court determined that the "similar act" testimony was admissible

with regard to the issue of intent of the defendant and concluded that it would be an inexcusable abuse of discretion if the Court denied the Government's application and granted the Government's application over the exception of defendant's counsel (A38-43).

Thereafter and following a brief continuation of the testimony of the witness Kupferberg, the Government proceeded with its direct case by introducing evidence of "similar acts" against the defendant.

TESTIMONY AS TO SIMILAR ACTS

The Government then produced three witnesses: Arthur Vorchheimer of J & N Vorchheimer, Salvatore Cucurullo and Stephen Korn, both of George Korn and Sons, who testified as to alleged "similar act." All of the witnesses had received letters of personal immunity from the Government as had the previous Government's main witnesses. The testimony of the witness Vorchheimer approximating 55 pages of Trial Transcript and fully contained for review herein (A44-96), in counsel's opinion, represents a clear and convincing example of the arguments raised by defendant's counsel against the admissibility of the "similar act" testimony proffered by the Government. The Trial Court's examination of the witness, Vorchheimer, added to the potential prejudicial effect of said testimony by the undue emphasis placed on the witness' testimony during the course of the Court's examination of the witness (A53-55). The Court dismissed the jury and thereafter proceeding in the jury's absence, commenced to admonish the witness, indicating that the witness was not being

candid with the testimony being offered by him, that the Court had the power to direct the Government, whether the Government wanted to or not, to lay the matter before the Grand Jury. (A56-57) Following the Court admonitions to the witness, the jury was recalled and the court continued to proceed to question the witness in the presence of the jurors, causing continued undue emphasis and improper inferences from the witness' testimony (A60-63).

In the cross-examination of the witness Vorcheimer, defendant's counsel commenced an attack of the witness' credibility and raised the issue of identification, since defendant's counsel was now faced with the "similar act" testimony and had no alternative but to proceed to attempt to mitigate and impeach said testimony through all available sources, including the issue of identification which had heretofore and intentionally not been raised by counsel.

The witness Cucurullo also testified with respect to alleged "similar acts" regarding payments made to the defendant while the defendant had worked for George Korn and Sons as a night inspector. As in the case of the other witnesses, the alleged payments were made in cash at places and times wherein there were no parties present and the witness could not recall any specific incident of payment to the defendant. As in the case of the witness Vorcheimer, defendant's counsel proceeded to cross-examine the witness, establishing on cross-examination that this witness, as in the case of the witness Vorcheimer, had occasion to appear at the United States Attorney's office in the Eastern District and contrary to the witness' present contention that he identified the photograph of the defendant as being one of the

meat inspectors that the witness had paid, that there was no Indictment of the defendant in the Eastern District and that, in fact, the photograph which was numbered and selected by the witness was, in fact, photograph number 87, whereas the defendant's photograph was photograph number 86.

The Government also called Stephen Korn as part of the "similar act" testimony being offered and Korn's testimony over the objection of defendant's counsel, established that although the witness himself had not paid the defendant, that he had given money to the previous witness Cucurullo to pay inspectors and that he had given said money to Cucurullo when the defendant was an inspector. The witness testified that he had never personally given any money to the defendant and that at no time did he ever identify the defendant in the Eastern District as being one of the meat inspectors who was paid by George Komand Sons. The witness also presented testimony on cross-examination which was contradictory to the testimony of the previous witness, Cucurullo, with regard to the payments allegedly being made to the Circuit Supervisor Rosen.

Following the testimony of Stephen Korn, the Government rested its case and the defendant made a Motion seeking a Trial Order of Acquittal on the grounds that the "similar act" testimony presented by the Government was unconvincing, equivocal, remote in time, cumulative in nature, unnecessary in view of the Government's prime case and totally prejudicial to the defendant and that a Trial Order of Acquittal was necessary to protect the defendant against an irrational or prejudicial verdict engendered

by the "similar act" testimony. The Motion was denied by the Trial Court (T. 431-32).

THE DEFENDANT'S CASE

The defendant called as its first witness Richard C. Gentlecore, a Special Agent of the FBI, who had been assigned in June of 1976 to defendant's case and who was engaged in interviewing a number of previous employees and owners of meat packing houses wherein the defendant had previously been employed since his appointment as a meat inspector.

This witness was called by the defense only after the admission by the Court of "similar act" testimony and as a direct result thereof. The "similar act" testimony was obtained by this witness in the course of his investigation of the instant case from a list prepared by him of those establishments wherein he had conducted interviews of the previous employees and employers of defendant. Defendant's counsel contended that the witness' results of the extensive various interviews conducted by him in relation to the defendant's previous employers was, in view of the admissibility of the "similar act" testimony, admissible as being exculpatory in nature and relevant evidence to be considered by the jury on the issue of intent, since that was the basis on which the Court admitted the "similar act" testimony in the Government's main case. Defendant's counsel contended that the jury should have the right to consider the results of all of the interviews conducted by this witness in their total evaluation of the facts now presented to them by the Government. The Court disagreed with defendant counsel's contention and precluded the defendant

from offering such testimony on that basis and further precluded the same from being offered under the Business Records Rule and instructed the jury as to its inadmissibility. (A156-57)

Following the conclusion of the direct examination of the witness and despite the Trial Court's ruling precluding defendant's counsel from proceeding to obtain the information sought, the Government, on cross-examination, immediately sought to improperly proceed to elicit the following testimony (A160)

"Q. And did you also find in the course of your investigation in Brooklyn that the employees of at least three of the houses said that they did recognize Mr. O'Connor and that, in fact, they had paid Mr. O'Connor?

A. Yes."

Even before the Court instructed the jury to disregard said testimony, defendant's counsel was on his feet seeking the Court's attention for the purpose of moving for a mistrial, which Motion was immediately made after defendant's counsel accepted the Court's invitation to strike (A161). The Court allowed the Government to continue its cross-examination before deciding any Motion over objection of defendant's counsel and then generally commented on hearsay testimony and requested that the jurors disregard what they had been previously told to disregard (A163).

In inquiring of the jury as to whether they understood, the forelady requested that the Court repeat its last statement, whereupon the Court again, in attempting to explain its position of necessity, had to refer to the substance of the improper testimony elicited from the Government and which was the subject of the Mistrial Motion (A164). The Court then continued on with questioning

the other jurors as to whether or not the Court's instructions were clear and whether the jurors could disregard the question that was asked and that it would have no prejudice (A165), whereupon Juror No. 9 responded as follows: (A166)

"THE COURT: And is it clear to you?

JUROR NO. 9: I will disregard that, but I have a little bit of difficulty.

THE COURT: No. don't say anything other than what I am asking you. I don't want you to tell me about a difficulty that may cause us a mistrial here. Just address yourself to what the Judge is asking. This happened, and I am trying to find out whether there is any prejudice or whether the jury can disregard what was brought out by that question.

I want your answer to that.

JUROR NO. 9: I can disregard it."

Following the Court's examination of the jurors, the Court requested of defendant's counsel whether or not there was anything further of the witness, whereupon defendant's counsel requested that he not be forced to put any additional questions to the witness until such time as the Court decided its Motion. The Court directed defendant's counsel to complete the examination of the witness (A169).

Following the Court's direction, defendant's counsel proceeded to attempt to mitigate the testimony of the witness Gentlecore and establish that two of the three incidents referred to by the witness were incidents which concerned the witnesses Vorcheimer and Stephen Korn or George Komand Sons. However, defendant's counsel could not inquire any further of the alleged

third act without himself bringing in evidence of a third "similar act" against the defendant. (A169-70) The Court in the jury's presence, asked the witness who the third party was and whether the witness could tell if the name had already been brought out in the trial, whereupon the witness answered that he really didn't know, whereupon the Court excused the jury and attempted to clarify the Court's understanding of what had occurred. (A170-72) The Court thereafter recalled the jury, advising the jury that there was a matter under consideration by the Court and that the Court needed more time to deliberate and to reach a conclusion and that, accordingly, in view of other court commitments, the jury would be excused and not have to return until Monday at approximately 12:30 P.M., whereupon the proceedings were adjourned at approximately 1:00 P.M. on that Friday afternoon (A173-76).

On the morning of May 23, 1977, at approximately 10 A.M., the trial continued in the absence of the jury and argument was heard with respect to the defendant's Motion for a Mistrial (A177-195). The parties also submitted Briefs to the Court on the morning of argument applicable to the issues involved (A197-204). Following the Court's denial of the defendant's Motion for a Mistrial, the Court proceeded with the trial without any further instructions to the jury, whereupon the defendant called Thomas B. St. Pierre. The witness was a Supervising Special Agent with the Security and Special Investigation Section of the office of Investigation of the United States Department of Agriculture.

He testified that he and his department were engaged in the investigation of certain meat inspectors employed by the

Department of Agriculture during the period 1973 to 1975 and it was the defendant's position that the testimony to be offered by this witness was exculpatory in nature and was relevant and to be considered by the jurors in view of the Court's ruling on the admissibility of "similar act" testimony (T506-509). As a result of the Court's ruling that such testimony was inadmissible under law, the witness was excused.

The defense next called Charles Christopher, an FBI Agent assigned to this investigation in an undercover capacity who worked along with the defendant and testified in substance that the defendant stated to the witness that the defendant knew the witness was no agent and that as a result of this confrontation, the witness felt that his undercover capacity had been diminished and that he had reported said conversation to his case supervisor. The witness further testified that he had not received any evidence of payment to the defendant during the course of his investigation.

Defendant then called Thomas O'Connor, an FBI agent and brother of the defendant. The witness was not assigned to this investigation but testified that while on an unrelated matter, while the witness was in the New York office of the Federal Bureau of Investigation, he was asked by Federal Agent Paul Stapleton, the Case Supervisor of the previous witness, as to whether he had a brother who was a Federal meat inspector, indicating that an agent had come across the defendant in his undercover capacity. The witness testified that Agent Stapleton requested his intercession with the defendant in getting defendant's cooperation in assisting the Federal Bureau in their

investigation into the meat industry. The witness testified that following a number of telephone calls between he, the defendant and Agent Stapleton, the defendant indicated that he would not cooperate as requested, but that he would not inform his Union of the ongoing investigation as he had originally threatened to do.

The defendant took the stand in his own defense and testified on direct examination that he did not take monies or other things of value from the companies charged in the Indictment or from those individuals who had testified with regard to the "similar act" incidents.

Unlike the factual circumstances of United States v. Gubelman, supra, the defendant's answers were specific and directed to the indictment and the "similar act" testimony which had been presented by the Government. The direct testimony of the defendant did not concern itself with any other meat packers or incidents. (T. 589-90, 594, 597, 609-10).

On cross-examination and over the objection of defendant's counsel (T. 638-39) the defendant was asked by the Court whether or not at any time he ever took meat from any of the meat packing houses that he was inspecting since he became an inspector. Defendant responded that he recalled one incident whereupon the Government then proceeded to examine the witness with respect to one Myron Bernstein of Omaha Hotel Supply Company. The defendant denied taking any package of meat from the Omaha Hotel Supply Company or Myron Bernstein when he was an inspector. The Court, over the objection of counsel (T.640-41) again permitted the Government to proceed into areas well beyond the

scope of proper cross-examination, apparently on the erroneous assumption that the defendant had testified on direct examination that he had never taken anything of value from the meat packing houses that he was inspecting, which was not the direct testimony of the defendant and which was adequately called to the Court's attention by defendant's counsel and by the defendant himself (T.640-641).

The defendant then called Herbert J. Slain, an employee of F. Strassberger and former co-employee of defendant who testified as to defendant's reputation for truth and honesty among his former employees while defendant was both an employee and inspector. Defendant thereafter called James C. McCormick, a compliance officer with the United States Department of Agriculture and former Circuit Supervisor and Supervisor of defendant who also testified to the defendant's general reputation within the industry as to truth and honesty. The defense thereafter called Father James P. Griffin, Pastor of St. Margaret's Church, Catoona, Riverdale, Bronx, New York, who also testified with regard to the defendant's reputation for truth and honesty within the community. The defendant then rested its case.

The Government then advised the Court that it had rebuttal testimony and wished to proceed with the same.

GOVERNMENT'S REBUTTAL TESTIMONY

The Government proceeded to introduce additional "similar act" testimony in the form of rebuttal testimony from Myron Bernstein, owner and manager of the Omaha Hotel and Supply Corp., and Sal DeAngelo, a butcher employed at the Omaha Hotel and Supply

Corp. These witnesses, it should be noted, were the same witnesses who were referred to by the Government in its original argument addressed to the issue of the admissibility of "similar act" testimony. The testimony of Myron Bernstein is another shocking example of the impropriety of such "similar act" testimony in the defendant's case, since such testimony was clearly equivocal, clearly the subject of grave dispute and clearly not for any other purpose but to bring the inference to the jury that the defendant was of bad character. The witness DeAngelo's testimony was cumulative in nature and used in an effort to buttress the testimony of the witness Bernstein on collateral matters, since the witness had no direct knowledge of meat being given to the defendant.

Following the testimony of said witnesses called by the Government, the defendant again testified and denied the testimony of the witness Bernstein. Additionally, the defense recalled Agent Gentlecore and through said witness introduced defendant's Exhibits "U" and "V" in evidence, which were handwritten and typewritten records of the original interviews by Agent Gentlecore of the witness Bernstein. Exhibits "U" and "V" in evidence adequately reflect the conversations and observations that were made by the witness in interviewing the previous witness Bernstein.

The contents of Exhibits "U" and "V" were read to the jurors and represented an obvious attack on the previous witness Bernstein's testimony, making such testimony, in the writer's opinion, incredible as a matter of law. The defense then rested its case and the Court charged the jury.

After deliberations for approximately two days, the jury found the defendant guilty of Counts One and Two of the Indictment and not guilty of the Third Count.

ARGUMENTPOINT I

UNDER THE FACTS OF THIS CASE, THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING THE GOVERNMENT, BOTH IN ITS DIRECT AND REBUTTAL CASES, TO INTRODUCE PRIOR SIMILAR ACT TESTIMONY

In its Trial Memorandum (A6), the Government proposed that prior "similar act" testimony be admitted to prove intent, plan, knowledge and the absence of mistake or accident (A8). Defendant objected, both in his Trial Memorandum (A12) and orally before the trial (T. 2-15) that the Trial Court should not exercise its discretion by allowing the prior "similar acts" to be presented to the jury, since they were not probative of a proper issue in the case (A 14-23) and since they were unduly prejudicial (A 24-26). The Trial Court reserved decision until the Government had introduced its evidence on the acts charged in the Indictment, at which time counsel for both sides were heard by the Trial Court on the subject (A27-43).

During oral argument, at the Trial Court's request, the Government made an offer of proof to the effect that the prior "similar acts" were identical to the charged offenses, but were committed in the years 1973 and 1974 at different meat houses (A27-30).*

*Government's Exhibit 7, stipulated into evidence at T. 346-48, reflects that defendant was an inspector at one or another of the "similar act" meat houses in the Eastern District from March, 1972 until January, 1974. The Indictment charges that money was received in the Southern District from July, 1974 until January, 1975. Thus, the interval between the charged acts and prior "similar acts" was from six months to 34 months.

There was no showing how this evidence related to a provable issue in the case. Defendant strenuously objected to the admission of prior "similar act" testimony, pointing out that it was not convincingly proved (A30-3), was cumulative (A33), was irrelevant to the charges (A33-4), that defendant had deliberately refrained from cross-examining and therefore, had not opened the door on the issues of identity and intent (A33), that the testimony was remote in time (A34), that it was prejudicial and inflammatory (A34) and that it would force defendant to attempt to bring in evidence from those in numerous meat houses in which defendant had worked who would testify they had never given him money (A37).

The Trial Court ruled that the prior "similar acts" were admissible in the Government's main case (A42), apparently to show intent (A39), and specifically refused to consider how convincing was the evidence of the prior "similar acts" (A39-41).

Rule 404 (b) of the Federal Rules of Evidence provides:

"Other crimes, wrongs or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Rule 403 of the Federal Rules of Evidence provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

These rules substantially codify the prior case law.

2 J. Weinstein & M. Berger, Weinstein's Evidence, § 403 (01) and 404 (08) (1976).

The admissibility of this prior "similar act" evidence rests within the sound discretion of the trial court. Some of the relevant guidelines informing this sound discretion have been succinctly expressed in United States vs. Adderly, 529 F. 2d 1178, 1180 (5th Cir. 1976) in which the Fifth Circuit held the following prerequisites must be met:

"[T]he prior offence must be [1] similar and must be [2] convincingly proved, [3] it must not be too remote in time, [4] the exception to the general rule of exclusion for which the offense is admitted must be a material issue in the instant case and there must be [5] a substantial need for the evidence."*

Although "similar act" testimony will be freely admitted where it is probative of a proper consequential fact and not unduly prejudicial, the Government must demonstrate the suitability of its introduction. **

Thus, in United States v. Benedetto, supra, a meat inspection bribery prosecution arising out of the same investigation as

* Although no Second Circuit case discusses all these elements or makes them all mandatory, most of these elements are included in the following cases: United States v. Santiago, 528 F. 2d 1130 (2d Cir. 1976), cert. denied, 425 U.S. 972 (1976); United States v. Kaufman, 453 F. 2d 306 (2d Cir. 1971); United States v. Deaton, 381 F. 2d 114 (2d Cir. 1967); United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965); and United States v. Marchiso, 344 F. 2d 653 (2d. Cir. 1965).

** Weinstein's Evidence suggests a three-step approach in evaluating whether similar act testimony should be admitted. First, the Government "... must be prepared to explain precisely how this evidence may tend to prove or disprove a proper consequential fact in the case." Weinstein's Evidence, supra, at p. 404-42. Second, "once the consequential material fact is identified, the probative force of the other crime evidence must be assessed." Weinstein's Evidence, supra, at p. 404-46. Third, the prejudice to the defendant of admitting the similar act testimony must be balanced against the probative value of the testimony. Weinstein's Evidence, supra, at p. 404-73, -74.

the instant case (see also United States v. Gubelman, supra), this Court said at 5:

" There is no presumption that evidence of other crimes is relevant to any issue in a criminal trial, although it often will be. [Citation]. Once the trial judge had decided that the evidence is relevant, under our cases and under Federal Rules of Evidence 403, the Judge must still weigh the probative value of the evidence against harmful consequences, principally 'unfair prejudice.' The danger is that once the jury is told of the defendant's other crimes, the jury will impermissibly infer that he is a bad man likely to have committed the crime for which he is being tried. Moreover, we have emphasized that admission of such strongly prejudicial evidence should normally await the conclusion of the defendant's case, since the court will then be in the best position to balance the probative worth of, and the Government's need for, such testimony against the prejudice to the defendant. [Cases cited] ."

Here, only two of the five elements recited in Adderly were attempted to be shown by the Government so as to properly inform the Trial Court's exercise of discretion. The Government did make a sufficient showing of similarity between the charged and prior "similar acts". Although an offer of proof was made that the alleged "similar acts" occurred in 1973 and 1974, there was no consideration by the Trial Court of the remoteness in time of the prior "similar acts" from the charged acts. There was a total absence of consideration, despite defense counsel's insistence, of how convincing the prior "similar acts" were proven, what the substantial need was for the evidence and how the evidence was probative of a material issue in the case. Nor was any significant attempt made to weigh the probative value of the testimony against the prejudicial effect to defendant.

The Trial Court allowed the Government to introduce prior "similar act" evidence in its case-in-chief in order to show defendant's intent and possibly to prove plan (A214-17). Defendant contends that neither of these issues was properly provable in this case by the use of "similar act" testimony.

The defendant did not contend, either in his opening, his cross-examination of the Government witnesses who testified regarding the charged offense, or in his direct case, that he took money by accident, mistake, as a loan, as repayment of a loan, or as a gift. His defense was basic and straightforward: that he did not receive money or anything else of value as alleged in the Indictment. In short, defendant did not "sharpen" the issue of intent.

It is true that prior "similar act" testimony has often been held by this Court to have been properly admitted on the issue of intent. See, for example, United States v. Deaton, *supra* and cases cited therein. We contend that those cases are readily distinguishable. In each of those cases, the defense put intent forcefully in issue in some manner. Here, defendant did not attempt to put forward a mitigating explanation for having received something. He very simply said that he had not received as charged by the Government.

Our contention here is underscored by the Trial Court's jury charge, where it said (A208-10):

"What is the third element that must be established beyond a reasonable doubt? You must find that Mr. O'Connor accepted money from the person, firm or corporation. You must find that he accepted the money in connection with or arising from his official duty. The purpose or intent with which the money was given

and with which it was accepted is absolutely not relevant to a finding of guilt. If he was an inspector at the time if the company was engaged in interstate and if he took money, no matter for what , the taking of the money under this sec f law, if a jury is convinced of it beyond a reasonable doubt -- not beyond all possible doubt -- establishes the guilt required by law.

. . . There is no charge here that he undertook to avoid the performance of a duty. That does not make the charge fatal. He is charged under that particular section of law that says that the mere taking of money or a thing of value without doing anything corrupt or improper other than the taking of the money -- the very taking of the money constitutes the offense.

The law says that it is a crime for an inspector to accept money if it is given for any purpose or intent whatsoever. If an inspector accepts money in connection with his official duty, it doesn't make any difference what the purpose was or what was in his mind or in the giver's mind. Money or things of value accepted by an inspector in connection with his official duties from the company he was inspecting is sufficient to establish the crime charged; and so, really, that is the heart of the case before you.

We are not talking about a loan. There has been no contest or any argument about that. We are talking about money given to the inspector, this defendant, at the time he was an inspector assigned to a particular meat plant."

The issues in this case could not have been simpler or more basic. This case boiled down to a classic credibility battle, the defendant saying that he did not receive money, the Government witnesses saying he did. If prior "similar act" evidence was admissible in this case to show intent, it must be admissible in every case in which general intent is an element. We do not believe that is the law.

We contend that this case is controlled by United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970), and United States v. Byrd, *supra*.

In DeCicco, the defendants were convicted of conspiring to transport stolen goods in interstate commerce, knowing them to be stolen. The Trial Court allowed a government witness to testify over objection that a short time before the charged offenses, defendant had arranged with him to sell two other stolen paintings. The defense consisted of a denial by the defendants that the acts alleged had occurred, and an attempt to impeach the Government's principal witness. The Second Circuit reversed and remanded, reasoning as follows at 484:

"This is not a case where, if one accepts [The Government witness'] testimony at face value, the statements and acts of the defendants lead to equivocal inferences. [His] story, if believed, leads ineluctably to the conclusion that the defendants knew what they were doing, for had any of the defendants admitted the facts testified to by [him], any claim that they were ignorant of the nature of the goods or their intended destination for sale to a prospective buyer would be patently incredible. Therefore, whatever probative value the prior crimes . . . added to the prosecution's case on the issue of defendants' intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants . . . were a continuing band of art treasure thieves and 'fencers.'"

In his concurring opinion, at 486, Chief Judge Lombard quoted Lord Sumner that, "The prosecution cannot credit the accused with fancy defenses in order to rebut them at the outset with some damning piece of prejudice."*

United States v. Byrd, supra, speaks directly to this point. There, an auditor employed by the Internal Revenue Service was

* Thus, here, the Government's contention in its Trial Memorandum that the prior similar act evidence was admissible to prove knowledge in the absence of mistake or accident was inappropriate.

charged and convicted of three counts of receiving a fee in connection with his official duties. The Second Circuit reversed on the ground that the Trial Court's charge had not sufficiently included the necessary element of required intent. In dictum, the Court criticized the Trial Court's exercise of discretion in allowing the Government to introduce a prior "similar act". The Court said at 575:

"The defense had not, either in its claims or the statement of facts which it would seek to prove, 'sharpened' the issue of intent by asserting that the act charged was done innocently or by accident or mistake. . . . There was, therefore, no pressing necessity that evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F. 2d 61, 67 (2d Cir. 1963). . . . For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or lack of any real necessity for it, is slight, its admission at that stage may be held to be an abuse of discretion."

Since in this case defendant had not "sharpened" the issue of intent, the Trial Court abused its discretion in admitting prior similar act testimony to prove intent

Although the Trial Court allowed introduction of the prior "similar act" testimony to show defendant's intent, it is possible that the evidence was also admitted to show plan (A215-17) and we will treat it as having been introduced partly for that purpose.

Each of the three counts of the Indictment charges that between July, 1974, and January, 1975, defendant received from the relevant meat houses an approximate, designated amount of money on a weekly basis (A4-5). The Trial Court charged the jury at A211 as follows:

" The exact dates when the money was accepted, and the exact amounts are not critical. For example, if an indictment charges \$25 and the actual amount received was \$50 or vice versa, or he received \$2, the amount does not decide the issue. It is what the evidence reveals. That kind of exactitude cannot possibly be put in an indictment.

. . . It doesn't matter if he did not take money every day of the week or every week of the month or if they did not follow, one week after another. If he took money on a date that is reasonably within the dates fixed in the indictment, a date that is not far from actuality, that is sufficient under law."

Thus, the Trial Court charged, neither the exact dates nor the exact amounts were critical. Furthermore, the regularity with which money was allegedly given and received was also irrelevant. It was not necessary that a rigidly uniform amount of money be involved under each count, that money be received on a particular day of the week, or that money be paid every week. It was only necessary that money be received on one occasion under each count to sustain a conviction under that count. Plan, in the sense of a regularly conducted activity, was thus irrelevant.

Here, as with intent, there are many Second Circuit cases approving the admission of prior "similar act" evidence for the purpose of illuminating a plan. We contend that those cases are distinguishable.

If the admission of the prior "similar act" testimony is approved on these facts, where there is a complete absence of relation or linkage between the charged acts and the prior "similar act", then "similar act" testimony would seem to be routinely admissible just by virtue of its similarity to the charged acts. That is not the law and cannot be the law if a trial is going to concern itself with indicated offenses and things truly related to those offenses.

Weinstein's Evidence, §404 [09] at 404 - 57 to -66, divides prior similar act testimony admitted to prove plan or design into three sub-categories as follows:

- (1) "Same or common or connected or inseparable plan or scheme or transaction, or res gestae . . . introduced . . . ' [t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" Weinstein's Evidence, supra at page 404-57.
- (2) "Continuing plan, scheme or conspiracy. . . 'to prove the existence of a definite project directed toward completion of the crime in question.'" Weinstein's Evidence, supra at page 404-59.
- (3) "Unique plan or scheme or pattern . . . 'so nearly identical in method as to ear-mark them as the handiwork of the accused.'" Weinstein's Evidence, supra at page 404-61.

The prior act evidence does not fit within the first sub-category since they do not "complete the story of the crime on trial by proving its immediate context of happenings near in time and place." The Court's attention is respectfully directed to United States v. Stadter, 336 F. 2d 326 (2d Cir. 1964), which does fit within this rubric. There, defendants were convicted of unlawfully selling heroin and conspiracy to do so. The Second Circuit approved the Government's introduction of evidence of similar, uncharged dealings in marijuana just prior to and contemporaneous with the heroin dealings. The defendants had used proceeds of the marijuana sales to purchase heroin. The two transactions were part of the same continuous plan, were close and even overlapping in time, and were organized and structured in the same way. The Court affirmed the introduction of similar act testimony because " [t]he marijuana transactions were but one as-

pect of the heroin conspiracy for which appellants were convicted." Stadter, supra at 329.

Nor can the prior similar act evidence be said to be part of a "continuing plan, scheme or conspiracy" within the second sub-category. The defendant was not charged with conspiracy. The Trial Court charged the jury that they should convict if they believed defendant took any money on any occasion between July, 1974, and January, 1975 (A211). The similar act evidence contributed nothing about a "definite project directed toward completion of the crime in question." It was probative only of probability, habit or inclination, not the existence of a plan of which the charged acts were a part. This is just another way of saying that defendant was a bad man who had performed these acts before and most likely had performed them during the times charged.

United States v. Light, 394 Fed. 2d 908 (2d Cir. 1968) is an example of a case where the "other crimes" evidence was properly admitted under this aspect of plan. The defendants there were three officers and one customer of a brokerage firm who were charged with and convicted for engaging in mail and wire fraud and conspiring to do so. Essentially, the plan was a stock fraud and kick-back arrangement. A customer of the brokerage firm testified that certain checks had been deposited in his account without his knowledge and that signatures purporting to be his were actually forgeries. Defendants objected to this testimony since it imputed to them the crimes of larceny and forgery. The Court stated the rule at 912 that other crimes evidence was admissible if "substantially relevant for some other purpose than to show probability." The admission of the other crimes evidence was

approved since it "was relevant to show plan or device for carrying out the crimes charged . . .," Light, supra at 913, and since the improper use of the witnesses account was an integral part of the crimes. In the instant case, in contrast, the prior acts were unconnected to the charged acts, and there was no plan. As the Fifth Circuit said in United States v. Goodwin, 492 Fed. 2d 1141, 1152-3 (5th Cir. 1974):

"[C]ourts have permitted the introduction of [other-crimes] evidence to show a design or scheme on the part of the accused to commit the specific crime with which he is charged, but never to show a design or scheme to commit 'crimes of the sort with which he is charged.'"

It should be noted that since the Government was allowed to introduce prior act testimony of an inculpatory nature to show a continuing plan by defendant to use his position as a meat inspector to receive bribes, it would have been fair to permit the defendant to introduce exculpatory testimony from the many meat houses where the management denied having paid defendant anything. This, the Trial Court prevented the defense from doing (A143-59).

The similar act evidence does not fit within the third sub-category ("the unique plan" rubric) since there is nothing like a unique "signature" involved. See Benedetto, supra at 6.

In short, plan was no part of this case. Certainly, the Government did not explain how plan was relevant or how the disputed "similar act" testimony related to that relevant plan. Indeed, the transcript reflects that there was not an iota of consideration given to that issue. In reality, the similar act testimony was introduced to show that defendant was a "bad man"

who had probably performed the charged acts. The evidence was inadmissible for that purpose.

The extensive "similar act" testimony was extremely prejudicial to the defendant, involving almost everyone of the strictures of Rule 403. Defendant contends that the unfair prejudice to him was incalculable and that the prior "similar act" testimony both confused the issues and mislead the jury so that a rational review by the jury of the central evidence to the trial became impossible.* The prior "similar act" testimony became the central issue of the trial and overwhelmed the evidence relevant to the acts charged in the Indictment. The words of this Court in United States v. Rowe, 360 F. 2d 1, 15-16 (2d Cir. 19), cert. denied, 385 U.S. 96 (1966), in upholding the Trial Court's exclusion of evidence, are particularly pertinent here:

"A trial judge has discretion to exclude evidence which is only slightly probative if its introduction would confuse and mislead the jury by focusing its attention on collateral issues and if it would unnecessarily delay the trial.... [I]t is apparent, as the trial judge stated after hearing extensive argument, that the introduction of the proffered testimony would have opened up a trial within a trial. It would not only have been improper to call witnesses to the alleged conversation... for purposes of clarifying whether, by whom and in what context the statements were made, but other witnesses might have been called for impeachment purposes. The trial judge correctly concluded that the confusion and delay which would have resulted from the introduction of Teahan's testimony outweighed its slight probative value."

* Three witnesses testified for the Government as to the charged acts, totalling 58 pages of direct and re-direct testimony: M. Jacobson -17 pages; B. Jacobson -25 pages; Kupferberg -16 pages. Five witnesses testified as to the three similar acts for a total of 83 pages of direct and re-direct testimony: Vorchheimer -33 pages; Cucurullo -20 pages; Korn -8 pages; Bernstein -18 pages; D'Angelo -4 pages.

This case is clearly distinguishable from Gubelman and Benedetto, supra. In Gubelman, this Court approved the admission of prior "similar act" testimony as probative of the issue of identity where defendant's counsel had sharply cross-examined several Government witnesses as to their ability to identify the defendant (p. 1751). Additionally, the Court in Gubelman noted at page 1751 that his testimony was "replete with innuendos that the Government witnesses erred in their identification of appellant as one of the corrupt meat inspectors" Here, there was no such issue. In fact, of the three witnesses who testified as to the charged acts of bribe receiving, two (T. 154, 590) had known defendant before he had become a meat inspector.

This case can also be distinguished from Benedetto. There, defendant's counsel had also cross-examined several of the Government witnesses regarding their identification of the defendant. More important, Benedetto testified in direct case that he had never taken bribes from anybody, and this Court approved the introduction of prior "similar act" testimony as impeachment under Rule 607.

Here, defendant O'Connor limited himself on his direct case to denials of receiving from the three witnesses who testified as to the charged acts (A207a,b,g,h), and the two prior "similar acts" which had been part of the Government's case - in-chief (A207c, f, g, h). Defendant here did not in his direct testimony gratuitously deny ever having taken a bribe from anyone, as did Benedetto.

When the defendant was asked on cross-examination if he had ever taken any money or meat from any of the houses he had inspected (A207i-n), defendant's counsel objected continually

(A207i, j, k, l, o) that that had not been his testimony, as did defendant (A207k,n). The Trial Court insisted that defendant had so testified (A207j, k, l) and allowed the Government to question the defendant along this entirely new line. A review of the record (A207a, b, c, f, g, h) will clearly show that defendant had narrowly limited his testimony to those witnesses presented in the Government's case-in-chief. Defendant's limited testimony here cannot be said to open the Rule 607 door as in Benedetto.

The prior "similar act" testimony was not properly admitted since it was not probative of a proper consequential fact in this case. Even if the Court were to find it was in some way relevant to a central issue in this case, the evidence, adding to and overwhelming the evidence of charged acts, was unduly prejudicial and denied defendant a fair trial.

POINT II

THE COURT'S FAILURE TO GRANT DEFENDANT'S
MOTION FOR A MISTRIAL FOLLOWING THE
TESTIMONY ELICITED FROM THE WITNESS
GENTLECORE AFTER THE JURY HAD HEARD
EVIDENCE OF "SIMILAR ACT" CONDUCT WAS
ERROR REQUIRING REVERSAL OF DEFENDANT'S
CONVICTION

Following the completion of the Government's direct case, the defendant called as its first witness Richard C. Gentlecore, an FBI agent who was specifically assigned to defendant's case. This witness was called by defendant as a result of the Court's allowance of "similar act" testimony. The defendant contended that the results of the witness' various interviews of those meat packing houses wherein the defendant was employed since his appointment would be admissible as being relevant and exculpatory evidence in view of the Court's determination to allow "similar act" testimony (T. 457-59). The Court precluded defendant's counsel from introducing such evidence and so instructed the jury as to the admissibility of same (A 156), thereby concluding the direct testimony of the witness. The Government on cross-examination immediately sought to improperly proceed to ask the following question and elicit the following answer: (A 160)

"Q And did you also find in the course of your investigation in Brooklyn that the employees of at least three of the houses said that they did recognize Mr. O'Connor and that in fact they had paid Mr. O'Connor?

A. Yes."

The Court instructed the jury that it was not to consider said testimony at all. Before the Court's instruction, defendant's counsel was on his feet seeking the Court's attention for the purpose of moving for a mistrial, which Motion was immediately

made after acceptance of the Court's invitation to strike (A160-61). The Court decided over objection of defendant's counsel to allow the Government to continue its cross-examination before deciding the Motion. The Court generally commented on hearsay testimony requesting that the jurors disregard what they had been previously told to disregard.

The potential prejudice that the jurors would be unable or unwilling to erase from their minds that information which had improperly come to their attention through the witness, was both real and reasonable in light of the fact that the jury had already heard, over objection of defendant's counsel, three witnesses who testified about two separate "similar acts" not contained in the Indictment concerning payments allegedly made to the defendant. The jury was now faced with allegations of what appeared to be three additional acts resulting in a natural, logical and reasonable inference that there now existed a total of five uncharged incidents of payment to the defendant.

That the Court recognized the obvious potential prejudice is demonstrated by the Court's comments at the sidebar wherein defendant's counsel moved for the mistrial (A161-63).

In inquiring of the jury as to whether they understood the Court's directive to disregard said testimony, the forelady requested that the Court repeat its last statement, whereupon the Court, in attempting to explain its position, again referred to the improper testimony elicited from the Government (A164). After amplification of the same, the Court continued to ask the other jurors whether they could disregard the question without prejudice (A165), whereupon Juror No. 9 responded as follows: (A166).

"THE COURT: And is it clear to you?

JUROR NO. 9: I will disregard that, but I have a little bit of difficulty.

THE COURT: No. Don't say anything other than what I am asking you. I don't want you to tell me about a difficulty that may cause us a mistrial here. Just address yourself to what the Judge is asking. This happened, and I am trying to find out whether there is any prejudice or whether the jury can disregard what was brought out by that question.

I want your answer to that.

JUROR NO. 9: I can disregard it."

After the Court's examination of the jurors and over the objection of defendant's counsel, the Court directed defendant's counsel to complete any examination of the witness. (A169) Defendant's counsel proceeded to attempt to mitigate the testimony of the witness Gentlecore and established that two of the three incidents referred to by the witness were incidents which concerned the witness Vorcheimer and Stephen Korn or George Korn and Sons which the jurors had previously heard in the form of "similar act" testimony. However, defendant's counsel could not inquire any further of the alleged third act without himself bringing to the attention of the jury evidence of a third "similar act" of alleged payment to the defendant which had not been brought to their attention on the Government's direct case and which if now done, would obviously have been additional prejudice to the defendant, caused by his own counsel. (A169-70)

The Court, in the jury's presence, asked the witness who the third party was and whether the witness could tell if the name had already been brought out in the trial and the witness indicated that he could not, whereupon the Court excused the jury

and attempted to clarify the Court's understanding of what had occurred (A170-72).

The Court thereafter recalled the jury, advising the jury that there was a matter under consideration by the Court and that the Court needed more time to deliberate and reach a conclusion and that, accordingly, in view of other court commitments the jury would be excused for the week-end and would not have to return until Monday afternoon at 12:30, whereupon the proceedings were adjourned at approximately 1:30 P.M. that Friday afternoon. (A 173-76).

On the morning of May 23, 1977, the trial continued in the absence of the jury and argument was heard with respect to defendant's Motion for a Mistrial (A177-195). The parties also submitted Briefs to the Court applicable to the issues involved (A197-204). Following the Court's denial of defendant's Motion for a Mistrial, the Court proceeded with the trial without any further instructions to the jury, even though the jurors had nearly three days to consider and absorb the improper testimony and to correlate it with other testimony heard.

In the Court's decision denying defendant's Motion for a Mistrial (A188-195), the Court admitted that at the time that the Court polled the jury, it was under the impression that the three instances related to episodes or meat packing concerns who had given money to the defendant over and above those who had already testified on the direct case. The Court acknowledged that it was damaging at the time but indicated that the damage had been diluted and almost removed completely by the testimony

given by the witness Gentlecore on questioning by defendant's counsel (A193).

Defendant contends that although the Trial Judge, after the benefit of argument and reflection, may have resolved any confusion of his own with respect to two of those incidents testified to by the witness Gentlecore, the reality remained that the jury was not privy to any of these additional considerations undertaken by the Trial Court and even if one was to assume that the jurors completely understood that two of the acts disclosed by the witness Gentlecore were already incidents which had been brought to their attention, what of the third unexplained incident, which even the Court was now aware had not related to any of the charges previously heard (A194):

"I want to know right now: who was the third name? Only two were given. Who was the third? The Third. Don't you know by this time?

MR. LAWLER: Omaha Hotel Supply Corporation.

THE COURT: Was that referred to at all in the course of the trial?

MR. LAWLER: Not to date, your Honor.

THE COURT: Very Well."

Defendant now asks was not this unexplained incident still within the minds of the jurors and the subject of potential prejudice? Was there not an inherent danger that the jurors in determining the issues might be unable or unwilling to erase from their minds that which had improperly come to their attention?

Although it is conceded that a jury is ordinarily assumed to follow clear instructions from the Trial Judge, it is defendant's

contention that not only were the instructions insufficient, but lacking in clarity and potentially prejudicial to the defendant when considered with the Court's Comments to the jurors immediately preceding their discharge for the week-end (A175-76).

The Supreme Court of the United States in Kotteakos v. United States, 328 U. S. 750 (1946) held:

" 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra 308 U. S. 287 , at 294 60 S. Ct. 198, 84 L. Ed. 257 . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by error. It is rather even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand' . Id. at 764-765, 66 S. Ct. at 1248."

In defendant's case the jury deliberated for approximately one and one-half days before returning two notes to the Court, one of which contained the following language (T. 886):

One of the notes says:

"Your Honor, the jury is hung up on the credibility of the witnesses from the three meat houses. Some jurors feel that there is a lack of evidence on the Government's presentation. One man said he gave money to O'Connor and the defendant denied each different occasion. If the witnesses perjured themselves on the stand, would they be prosecuted at a later date?"

As in Kotteakos, supra, can it be said in defendant's case with a fair assurance, after pondering all that had happened during the course of the trial that the jury's judgment was not

substantially swayed by the error? Defendant contends that when considering all of the facts of this case, there was an inherent danger that the jurors, in determining the issues, might be unable or unwilling to erase from their minds that which had improperly come to their attention and that the only appropriate remedy in such situation was to grant the defendant's Application for a Mistrial. (See U. S. v. Jacongelo, 281 F. 2d. 574, (3rd Cir. 1960); U. S. v. Gray, 468 F. 2d. 257, (3rd Cir. 1972); U. S. v. DeDominicis, 332 F. 2d 207, (2d. Cir. 1964); U. S. v. Jackson 418 F. 2d. 786, (6th Cir. 1969); U. S. v. Carney, et al, 461 F. 2d. 465, (3rd Cir. 1972); Marshall v. U. S., 360 U. S. 310; and Holt v. U. S., 94 F. 2d. 90 (10th Cir. 1937).

Defendant submits that on the facts of this case, the cost of a new trial weighs less on the scales of justice than the possibility of an improperly obtained verdict of guilty. The risk that the jury might have taken into consideration the inadmissible testimony is too great to allow the conviction to stand. Defendant respectfully submits that it was far more than harmless error not to have granted a mistrial as requested by defendant's counsel.

POINT III

DEFENDANT WAS DENIED A SIXTH AMENDMENT
RIGHT TO CONFRONTATION BY THE TRIAL COURT'S
ERRONEOUS RULINGS WHICH LIMITED BOTH DIRECT
AND CROSS-EXAMINATIONS BY DEFENDANT'S COUNSEL.

We have already adverted to the fact that the Trial Court denied an important right of confrontation when, having already admitted evidence of "similar act" conduct on the Government's direct case, it precluded defendant's counsel from

inquiring of Special Agent Gentlecore with regard to the results of the extensive interviews conducted by the witness in relation to the defendant's previous employers.

It is defendant's position, as set forth in the Memorandum submitted to the Court (A102) that the results of the witness' interviews as contained on Exhibits "Q" and "R" (A109 & 116), were relevant and exculpatory in nature. To deny defendant's counsel the right to inquire therefrom deprived defendant of his fundamental right of cross-examination.

Other instances of the same erroneous rulings are contained in the Trial Record and include the following instances:

The cross-examination of the witness Kupferberg wherein the Court precluded the admission of defendant's counsel of a Transcription of a conversation between the witness and one Arturo Romanelli, an undercover meat inspector paid by the witness, which Transcript, in counsel's opinion, was bearing on the credibility of the statements made by the witness to the Government on the Government's direct case (T.263-66); the cross-examination of the witness Salvatore Cucurullo when defendant's counsel was not allowed to introduce, during cross-examination, evidence of defendant's inconsistent statements concerning the defendant given to the United States Attorney in the Eastern District (T374-384).

Defendant contends these questions were not mere inquiries based on nonsensical curiosity but were important cornerstones of the cross-examination. Cross-examination is a fundamental right and may not be frustrated. Brookhart v. Janis, 1966,

384 U. S. 1, 3; Smith v. Illinois, 390 U. S. 129, 131, 132;
Alford v. United States, 282 U. S. 267.

It has also been said that the defense best knows what may be of help to its cause and thus only it should make that decision unless clearly untenable. Alderman v. United States, 394 U. S. 165 (1969) .

The right of cross-examination is "the greatest legal engine ever invented for the discovery of the truth." Douglas v. Alabama, 380 U. S. 415 (1965); Pointer v. Texas, 380 U. S. 400 (1965); Dennis v. United States, 384 U. S. 855 (1966) and 5, Wigmore, Evidence, §1367 (3d ed. 1940).

In Heard v. United States, 255 Fed. 829, The Court of Appeals explained at id. 832:

"A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary."

Defendant contends that the Court's rulings applicable to the above inquiries were erroneous and constituted plain error and that under the totality of the circumstances, such error requires a reversal of the defendant's conviction.

POINT IV

THE TRIAL COURT COMMITTED PREJUDICIAL
ERROR DENYING DEFENDANT A FAIR TRIAL
IN CHARGING, PURSUANT TO THE GOVERNMENT'S
REQUEST AND OVER DEFENDANT'S OBJECTION,
THE CONGRESSIONAL INTENT IN PASSING THE
MEAT INSPECTION ACT, AND IN GIVING TWO
ALLEN CHARGES

Pursuant to the Government's Request To Charge and over defendant's exception (T.727), the Trial Court charged the Congressional Intent in passing the Meat Inspection Act (A. 218 a-c). This charge was a condensation of a somewhat longer instruction on the subject given by the Trial Court during jury selection and not appearing in the record.

There was no claim at trial and there is a complete lack of evidence that the defendant had ever neglected his duty as a meat inspector. In fact, the Trial Court charged the jury that the law was violated if the defendant took money in connection with his official duties and it was irrelevant whether he was a good or bad meat inspector (A.209-10). Defendant contends that the above quoted charge was totally unnecessary, was collateral to the trial and was unduly prejudicial to the defendant, denying him a fair trial on the truly relevant questions.

In United States v. Leon, 534 F. 2d 667 (6th Cir.1976), the Court reversed a gambling conviction because the Government made a number of references to the purpose of congress in passing the law under which defendant was prosecuted. In final argument the Government discussed the Congressional finding that gambling was harmful to the public welfare. The Trial Court in Leon allowed these comments to be placed before the jury and initially indicated that this argument was proper. The Government continued its remarks after the Trial Court advised it to stop

discussing the subject, but did not give a proper cautionary instruction to the jury. The Court found that the evidence was sufficient to go to the jury, although not overwhelming, but noted that the jury deliberated for two days. In the exercise of its supervisory powers, the Court reversed and remanded, because on the facts of that case the arguments by the Government on legislative intent were irrelevant to the issues at trial and prejudicial to the defendant.

In the instant case, the remarks regarding legislative purpose came from the Trial Court. Defendant contends that this was far more prejudicial to the defendant than the Government's remarks in Leon. It was particularly prejudicial to the defendant considering the authority, persuasiveness and dignity with which the charge was given in the instant case. U.S.v.D'Anna, 450 F.2d 1201.

The Trial Court here gave the jury the "Allen" or "dynamite" charge twice during their two days of deliberation (A. 219,227). The giving of two Allen charges in close proximity is coercive enough.* Here, however, the Trial Court injected itself into the jury room by commenting, in connection with the second Allen charge, on a remark that had been overheard from the jury room (A. 227-9). That remark was almost certainly heard by one of the "minority" jurors to whom the Allen charge itself was directed, thus having the effect of coercing that minority still further.

This by itself was error. Taken together with the charge on legislative intent and the similar act evidence, defendant was certainly denied a fair trial. In view of the two days of deliberation

* The Allen charge has been attacked on several grounds, among them that it contains a factual inaccuracy, that this case "must be disposed of sometime (A. 220,229), and that "If it is left open we have got to start afresh" (A. 229).

on a factually simple case, the acquittal on one charge, and the recommendation of clemency, it is a certainty that these errors combined to improperly coerce the jury.

CONCLUSION

On the facts of this case, the Judgment of Conviction on Counts One and Two should be reversed, with direction to dismiss the Indictment; in the alternative, a new trial should be granted.

Respectfully submitted,

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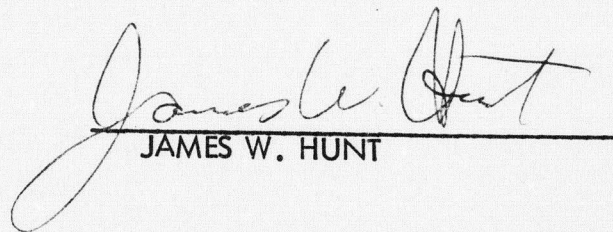
Of Counsel

STATE OF NEW YORK)
) SS.:
COUNTY OF ROCKLAND)

JAMES W. HUNT being duly sworn, deposes and says:

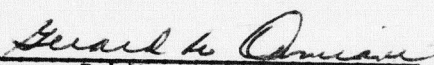
I am not a party to the action, am over 18 years of age and reside at 542D
Broad Avenue, Palisades Park, New Jersey 07650.

On April 5, 1978, I served a true copy of the annexed Defendant-Appellant's
Brief and Appendix by mailing the same in a sealed envelope, with postage prepaid thereon,
in a post office or official depository of the U. S. Postal Service within the State of New
York, addressed to the last known address of Honorable Robert B. Fiske, United States Attorney,
Southern District of New York, One Andrew Plaza, Foley Square, New York, New York.


JAMES W. HUNT

Sworn to before me this

5th day of April, 1978


Notary Public

GERARD M. DAMIANI
Notary Public, State of New York
No. 4653010
Qualified in Rockland County
Term Expires March 30, 19